# **UNITED NATIONS EXPERT MECHANISM ON THE RIGHTS OF INDIGENOUS PEOPLES**

**Written submission on the Draft Convention on the Right to Development**

**17 May 2023**

**Introduction**

1. In response to the request from the Chair-Rapporteur of the Intergovernmental Working Group on the Right to Development, the intention of this short note is to provide comments on how it impacts and/or recognises, if at all, the right of Indigenous Peoples to development and textual suggestions on the revised draft Convention on the Right to Development.
2. The first part of this note will review some relevant context to the Right to Development within existing human rights frameworks, including how the Right to Development is recognised by the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), before examining, in Part Two, how the revised draft Convention on the Right to Development includes an Indigenous right to development, the gaps between the UN Declaration on the Rights of Indigenous Peoples and the revised draft Convention on the Right to Development, followed by some recommendations in Part Three.
3. As an overall comment, in the exercise of development by others, clear language should be included regarding respect for and recognition of the interrelated rights of Indigenous peoples as well as equity and sustainable and equitable development, meaning that Indigenous peoples in the context of development overall, must gain equitably from such actions, etc.

**Part One: Context to the revised Draft Convention on the Right to Development**

1. The revised draft Convention draws heavily on the Universal Declaration of Human Rights, the provisions of the UN Charter, the International Convention on Civil and Political Rights (ICCPR), the International Covenant on Economic Social and Cultural Rights (ICESCR), and the 1986 UN Declaration on the Right to Development. Although the neither the ICCPR nor the ICESCR refers to a right to development, many of the fundamental principles contribute to its understanding.
2. Academics have noted that the Right to Development should address the economic imbalance between the developed and developing states and integrate human rights and economic development issues.[[1]](#footnote-1) However, Yash Ghai has claimed that any significance a right development may achieve merely ‘diverts the attention from the pressing issues of human dignity and freedom masking the true nature of human rights and provides increasing resources and support for state manipulation of civil society and groups’[[2]](#footnote-2). This would extend to include Indigenous Peoples.
3. The Declaration on the establishment of a New International Economic Order (NIEO)[[3]](#footnote-3) is regarded as assisting to shape the right to development.[[4]](#footnote-4) Although met with some resistance, the Declaration expresses a desire for a need to establish a New International Economic Order based on equity, sovereignty equality and co-operation, to correct inequalities and reduce the gap between developed and developing countries.
4. The reference to postcolonial international economic and social order is based on Western hegemony, imperialism and neo-colonialism. This foundation is important as international economic law scholars have often viewed Indigenous rights as sitting outside the realm of international economic law.[[5]](#footnote-5) The principles of the NIEO itself neglects Indigenous Peoples’ rights and instead is concerned with State sovereignty and equality.[[6]](#footnote-6) Reference to Indigenous Peoples is limited to the creation of Indigenous technologies that will benefit developing countries in accordance to their economies.[[7]](#footnote-7) This is problematic as the right to Indigenous technologies lie with Indigenous Peoples not the developing or respective country.
5. This point does not stand as a criticism of the Right to Development, but as a reflection to the UN Expert Mechanism on the Right to Development that the foundations are inherently biased against Indigenous Peoples.
6. In 1979, the General Assembly recognized the right to development in its resolution 34/46 of 23 November 1979 under the title “Alternative approaches and ways and means within the United Nations system for improvising the effective enjoyment of human rights and fundamental freedoms”. Together with the UN Secretary-General’s report laid the basis for the subsequent development of the Declaration on the Right to Development. The Report concluded that the Right to Development as a human right can be inferred from the existing norms and principles of international law recognised under numerous hard and soft law frameworks. The Right to Development was formally recognised by the UN in its 1986 Declaration on the Right to Development and adopted by the UN General Assembly resolution 41/128 of 4 December 1986.
7. While the 1986 Declaration was adopted with the overwhelming support of States, questions as to its justiciability arose, as the Declaration was viewed as a broad framework yet to crystalise into substantive law with concrete obligations.[[8]](#footnote-8) In addition the status of a right to development as a human right was historically contentious. [[9]](#footnote-9)
8. Today, debate continues as to the normative contents and resulting State obligations, with the text criticised as ‘vague and inconsistent’.[[10]](#footnote-10) In particular, we note gaps carried through to the present revised draft for instance:
9. the general application of the right to development “Every human person and all peoples have the inalienable right to development …” (in article 1 and 4 (1));
10. Popular participation (‘active, free and meaningful participation) (article 8(2) and 4 (2)); Several Articles of the Declaration note that ‘active, free and meaningful participation’ is an integral part of the right, however, the question is whether the ‘participation requirement confers a collective decision-making power on the people concerned or a mere consultation is sufficient, which the Declaration does not answer’.[[11]](#footnote-11)
11. Emphasis on ‘equality of opportunity for all…’ (art 8 (1) and 12 (2)). This expresses a fair distribution of the benefits of development in equal access to all public services, this could not be achieved without the participation of vulnerable and marginalized groups, such as Indigenous Peoples, in development and the ‘[eradication of] all social injustices’.[[12]](#footnote-12)
12. The nature of national level and international community obligations (art 10). This appears to be more of a moral responsibility rather than a legal obligation.[[13]](#footnote-13)
13. The uncertainty of the 1986 Declaration together with the omission of an Indigenous right to development requires that the present revised draft Convention articulate Indigenous Peoples’ Right to Development in manner that complements the UN Declaration on the Rights of Indigenous Peoples with an emphasis on the unique relationship Indigenous Peoples have with their environment, the philosophy that guides Indigenous Peoples, their intrinsic rights to their lands, territories and resources, the relevant actors and their legal obligations. However in noting this, one significant advancement of the revised draft Convention that we cannot overlook is the explicit acknowledgment of Indigenous Peoples’ rights.

## **United Nations Declaration on the Rights of Indigenous Peoples**

1. The right of Indigenous Peoples to development is captured extensively within the preamble of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) as well as within the substantive articles, reflecting the importance of this right.
2. Within the preamble, this recognition of the Right to Development is not only contextual, but substantive. For instance, the preamble notes that due to the historic injustices, such as, colonization and dispossession of their lands, territories and resources, this has prevented the exercise of a right to development in accordance with their own needs and interests, and there is a resulting need for Indigenous Peoples to promote their development in accordance with their aspiration and needs. In addition, the preamble recognises that the respect for Indigenous knowledge contributes to equitable development and importantly that the UN Charter affirms the fundamental importance of a right to self-determination by which Indigenous Peoples freely determine and pursue their own economic, social and cultural development.
3. Within the substantive articles the key right of self-determination captures the right of Indigenous Peoples to freely ‘determine their political status and freely pursue their economic, social and cultural development.’ Additional articles within the UNDRIP apply this to:
4. ‘maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature’ (art 11);
5. ‘the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains’ (art 12);
6. ‘the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons’ (art 13);
7. ‘the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions ‘(art 18);
8. ‘the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities’ (art 20);
9. ‘the right to determine and develop priorities and strategies for exercising their right to development. In particular, Indigenous Peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions’ (art 23);
10. ‘the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired’ (art 26 (2));
11. ‘the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions’ (art 31);
12. ‘the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources’ (art 32) and States shall consult and cooperate in good faith with the Indigenous Peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources’ (art 32 (2));
13. ‘the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards’ (art 34); and
14. ‘in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders’ (art 36).

Subsequently, the right to development is extensive and a key right for Indigenous Peoples recognised in conjunction with a host of activities including a specific right to development as provided in article 23. This contextual recognition of an Indigenous Right to Development is central to an understanding of what the right entails and how it may be exercised

**Part Two: The revised draft Convention on the Right to Development and an Indigenous right to development**

1. The revised draft Convention on the Right to Development was released in April, 2022 and contains 38 articles in five parts.[[14]](#footnote-14) The Draft draws on the previous 1986 UN Declaration on the Right to Development and the UDHR seeking to consolidate the interdependence between human rights and development by providing a, potentially, binding framework as well as addressing the gaps from the previous Convention.[[15]](#footnote-15) The previous UN Declaration on the Right to Development was silent on an Indigenous right to development and this revised draft Convention provides an opportunity to ameliorate this lacuna.
2. Refreshingly, the reference to Indigenous Peoples is included in both the preamble of the current revised draft Convention and also the substantive articles. The preamble references the rights of Indigenous Peoples as contained in specific international instruments and practices:
3. *Recalling* the provisions of all human rights treaties, as well as other international instruments, including the United Nations Declaration on the Rights of Indigenous Peoples and the United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas,
4. *Recalling* the reaffirmation of the right to development in several international declarations, resolutions and agendas, including … the United Nations Declaration on the Rights of Indigenous Peoples
5. *Taking note* of the regional human rights instruments and the subsequent practices relating thereto that specifically recognize and reaffirm the right to development, including the African Charter on Human and Peoples’ Rights, the Inter-American Democratic Charter, the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, the Arab Charter on Human Rights, the Human Rights Declaration of the Association of Southeast Asian Nations, the American Declaration on the Rights of Indigenous Peoples, and the Abu Dhabi Declaration on the Right to Development.
6. More specifically the substantive article 17 provides:
7. Indigenous Peoples have the right to freely pursue their development in all spheres, in accordance with their own needs and interests. They have the right to determine and develop priorities and strategies for exercising their right to development.
8. In accordance with international law, States Parties shall consult and cooperate in good faith with the indigenous and tribal peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.
9. States Parties shall consult and cooperate in good faith with the Indigenous Peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

Although promising and an improvement on the previous UN Declaration on the Right to Development, issues still remain.

# **UN Expert Mechanism on the Rights of Indigenous Peoples (EMRIP)**

The Chair and members of the UN Expert Mechanism on the Rights of Indigenous Peoples contributed to the recent UN Expert Mechanism on the Right To Development (UN EMRTD) session held in 2022. During this session EMRIP was alerted and invited to comment on the draft UN Convention on the Right to Development.

To continue the positive relationship between the UN Expert Mechanism on the Right To Development and EMRIP, an invitation to the UN EMRTD to attend and participate in the July, 2023, EMRIP session has been extended. In addition a joint activity between both mechanisms during the July session, within the area of a right to development is proposed as an effort to share and learn how both mechanisms can work together.

The main issue for EMRIP turns on a meaningful and clear recognition of an Indigenous right to development as provided for in international instruments including the UNDRIP. The current inclusion in article 17, although welcomed, falls short.

**Why the current revised Draft Convention requires greater recognition of an Indigenous right to development**

Indigenous Peoples often endure the control and uncompensated intrusion and encroachment of their ancestral lands by corporate companies who undertake resource extraction activities. Indigenous Peoples suffer from the greed and corruption that can accompany power in the form of authoritarian governments, insatiable corporations, and unscrupulous individuals.[[16]](#footnote-16) This extends to deprivation of land, wealth, and opportunity, reinforcing the need for not only a recognised Indigenous right to development but the additional contextual rights to ensure that Indigenous Peoples right to development occurs on a level playing field and is not subjected to the power from oppressive governments.

If Indigenous Peoples are not included when a right to development is exercised, often illegitimately, Indigenous Peoples are impacted in ways that increase inequality. For instance, alienation from their lands for a resource extraction concession, development projects, or even the creation of protected areas for environmental conservation occurs without any compensation or economic alternatives, further exacerbating the inequality divide.

Article 17 is the only article that explicitly recognises an Indigenous People’s right to development within the revised Draft Convention. We consider that to an extent, this misses the point, as indigenous rights cut across all facets of the Right to Development. Moreover, on its own, article 17 does not go far enough. Such a provision has to explicitly address, underscore the interrelated, interdependent, interconnected and indivisible rights of Indigenous peoples as affirmed in the UN Declaration on the Rights of Indigenous Peoples.

The Right to Development grew out of the global push for decolonisation. However, the focus was on the development of states themselves, not how different groups within states should have rights of development over their resources. Moreover, development was equated with economic success.

Although there may now be a step away from a western centric ideals, economic objectives are often diametrically opposed to many indigenous collective structures that often prioritise a reciprocal relationship with the environment to financial wealth. This reciprocal relationship is underpinned by a different set of values that are not necessarily economically driven. Therefore, the revised draft Convention’s substance must not only actively seek to ensure that the values that guide an Indigenous right to development is included but this inclusion is not thwarted by the need for economic success as a measure for the right to development.

Although not explicit, to some extent this is acknowledged in article 17 (1), with ‘a right to develop own priorities and strategies in pursuing development’. However, we are concerned that developing new priorities and strategies should not be interpreted as the only way that Indigenous Peoples can exercise their Right to Development; nor is it the only way Indigenous Peoples may seek to exercise their right to development. Many Indigenous Peoples already have priorities and strategies that help them develop in a way that aligns with their needs and interests, which the revised draft Convention must seek to uplift.

The inclusion of the obligation to both ‘consult and cooperate’ and ascertain ‘free, prior and informed consent’ is commendable, as this implies that the relationship is continuing beyond the initial consultation. But it is an unfortunate reality that all too often consultation is inadequate or does not occur at all. This article could be strengthened through stronger wording, emphasising *proper* consultation and ensure that the relationship established is a continuing one.

The inclusion of ‘tribal peoples’ used in conjunction with Indigenous Peoples in article 17 (2) is unusual, implying that first, tribal peoples are not Indigenous Peoples and second, that tribal peoples are not entitled to the same protections afforded to Indigenous Peoples in the remainder of article 17.

The requirement to consult with Indigenous People’s representative institutions begs the question, what if Indigenous Peoples do not have representative institutions? Consultation should certainly occur with the group who has the appropriate mandate to act on behalf of the Indigenous Peoples concerned, but is not always an institution per se. The Convention should not imply that consultation can only occur on the basis of two institutions talking to each other. For consultation to be adequate it must be locally specific, Indigenous, and genuinely engage with the Indigenous People to ensure free, prior and informed consent is obtained.

The emphasis on physical resources is treated with caution. While they are often of great significance to Indigenous Peoples, those listed should not appear to supersede the right to develop others. In particular, Indigenous Peoples may wish to maintain, control protect and develop their cultural heritage traditional knowledge, traditional cultural expressions and customs or their constitutional structures.

**Part Three: Recommendations/Feedback**

1. The Expert Mechanism provides the following recommendations/feedback on the revised draft Convention on the Right to Development
2. The revised draft Convention on the Right to Development, as far as practicable, should complement and be consistent with an Indigenous peoples’ right to development as affirmed in the UN Declaration on the Rights to Indigenous Peoples.
3. The fundamental norm of the United Nations Declaration on the Rights of Indigenous Peoples is the right to self-determination recognized in article 3: “Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.” Additional language should be included to ensure that Indigenous Peoples, in exercising their right to self-determination, as it relates to the Right to Development, have the right to self-determination, autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions (art 4).
4. Additional language should be included to ensure that the ability to
5. ‘maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature’ (art 11);
6. ‘manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains’ (art 12);
7. ‘revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons’ (art 13);
8. ‘participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions (art 18);
9. ‘maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities’ (art 20);
10. ‘determine and develop priorities and strategies for exercising their right to development. In particular, Indigenous Peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions’ (art 23);
11. ‘own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired’ (art 26 (2));
12. ‘maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions’ (art 31);
13. ‘determine and develop priorities and strategies for the development or use of their lands or territories and other resources’ (art 32) and States shall consult and cooperate in good faith with the Indigenous Peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources (art 32 (2));
14. ‘promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards’ (art 34); and
15. ‘those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders’ (art 36).
16. Any reference to legislative or administrative measures should be consistent with an Indigenous right to maintain and develop their political economic and social systems and to be able to engage freely with their traditional and other economic activities (art 19).
17. The inclusion of this language could be as simple as a phrase that defers to the Declaration on the Rights of Indigenous Peoples, for example, amending article 17 to include:

“Indigenous Peoples in freely pursuing their development in all spheres and in exercising their right of self-determination have the right to determine and develop priorities and strategies for exercising their right to development, as consistent with the fundamental rights included in the UN Declaration on the Rights of Indigenous Peoples.”

1. The preamble should include a specific reference to an indigenous right to development, that acknowledges Indigenous Peoples as the actors. Such a reference would highlight the significance of an indigenous right to development and compensate for how Indigenous Peoples have been disproportionately afforded the right throughout its evolution.

1. Isabella D. Bunn, "The Right to Development: Implications for International Economic Law," American University of International Law Review 15, no. 6 (2000): 1425-1468, at 1426. [↑](#footnote-ref-1)
2. At 1426. [↑](#footnote-ref-2)
3. UN Declaration on the Establishment of a New International Economic Order A/RES/S-6/3201; < http://www.un-documents.net/s6r3201.htm> [↑](#footnote-ref-3)
4. G Varges ‘The New International Economic Order Legal Debate 39, 42, where developing countries did not consider the NIEO as having legal force while developed countries did not. As cited by Bunn, above n 1 at 1431. [↑](#footnote-ref-4)
5. Sergio Puig ‘International Indigenous Economic Law’ UC Davis LR, Feb 2019, Vol 52, 3.

   <https://lawreview.law.ucdavis.edu/issues/52/3/Articles/52-3_Puig.pdf> (pp1246-1247) [↑](#footnote-ref-5)
6. NIEO article 4. The new international economic order should be founded on full respect for the following principles: (a) Sovereign equality of States, self-determination of all peoples, inadmissibility of the acquisition of territories by force, territorial integrity and non-interference in the internal affairs of other States;... [↑](#footnote-ref-6)
7. UN Declaration on the Establishment of a New International Economic Order A/RES/S-6/3201; < <http://www.un-documents.net/s6r3201.htm>> at 4 (p). [↑](#footnote-ref-7)
8. Roman Girma Teshome, The Draft Convention on the Right to Development: A New Dawn to the Recognition of the Right to Development as a Human Right?, Human Rights Law Review, Volume 22, Issue 2, June 2022, ngac001, <https://doi.org/10.1093/hrlr/ngac001> [↑](#footnote-ref-8)
9. S Subedi “Declaration on the Right to Development’ (2021) UN AV Library of International Law at 6. [↑](#footnote-ref-9)
10. Roman Girma Teshome, The Draft Convention on the Right to Development: A New Dawn to the Recognition of the Right to Development as a Human Right?, Human Rights Law Review, Volume 22, Issue 2, June 2022, ngac001, <https://doi.org/10.1093/hrlr/ngac001> [↑](#footnote-ref-10)
11. Roman Girma Teshome, The Draft Convention on the Right to Development: A New Dawn to the Recognition of the Right to Development as a Human Right?, Human Rights Law Review, Volume 22, Issue 2, June 2022, ngac001, <https://doi.org/10.1093/hrlr/ngac001> [↑](#footnote-ref-11)
12. Roman Girma Teshome, The Draft Convention on the Right to Development: A New Dawn to the Recognition of the Right to Development as a Human Right?, Human Rights Law Review, Volume 22, Issue 2, June 2022, ngac001, <https://doi.org/10.1093/hrlr/ngac001> [↑](#footnote-ref-12)
13. Roman Girma Teshome, The Draft Convention on the Right to Development: A New Dawn to the Recognition of the Right to Development as a Human Right?, Human Rights Law Review, Volume 22, Issue 2, June 2022, ngac001, <https://doi.org/10.1093/hrlr/ngac001> [↑](#footnote-ref-13)
14. Revised Draft Convention on the Right to Development, 22 April 2022, A/HRC/WG.2/23/2. [↑](#footnote-ref-14)
15. At p 2. [↑](#footnote-ref-15)
16. Puig above n 5, at 1246 [↑](#footnote-ref-16)